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CHARLES ELMORE PROPLA

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 419....

F. W. WOOLWORTH CO., and NIPS, INC.,
Petitioners,

against

GUERLAIN, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF THE STATE OF NEW YORK AND BRIEF
IN SUPPORT THEREOF

MARTIN A. SCHENCK,
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INDEX

PETITION FOR WRIT OF CERTIORARI:	PAGE
I—Summary Statement of the Matter Involved ..	1
II—Statement of Jurisdiction	3
III—The Questions Presented	3
IV—The Statutes Involved	4
V—Manner in Which Questions Herein Presented are Raised	6
VI—Summary Statement of Facts	7
VII—Reasons Relied Upon for the Allowance of the Writ	9

BRIEF IN SUPPORT OF PETITION:

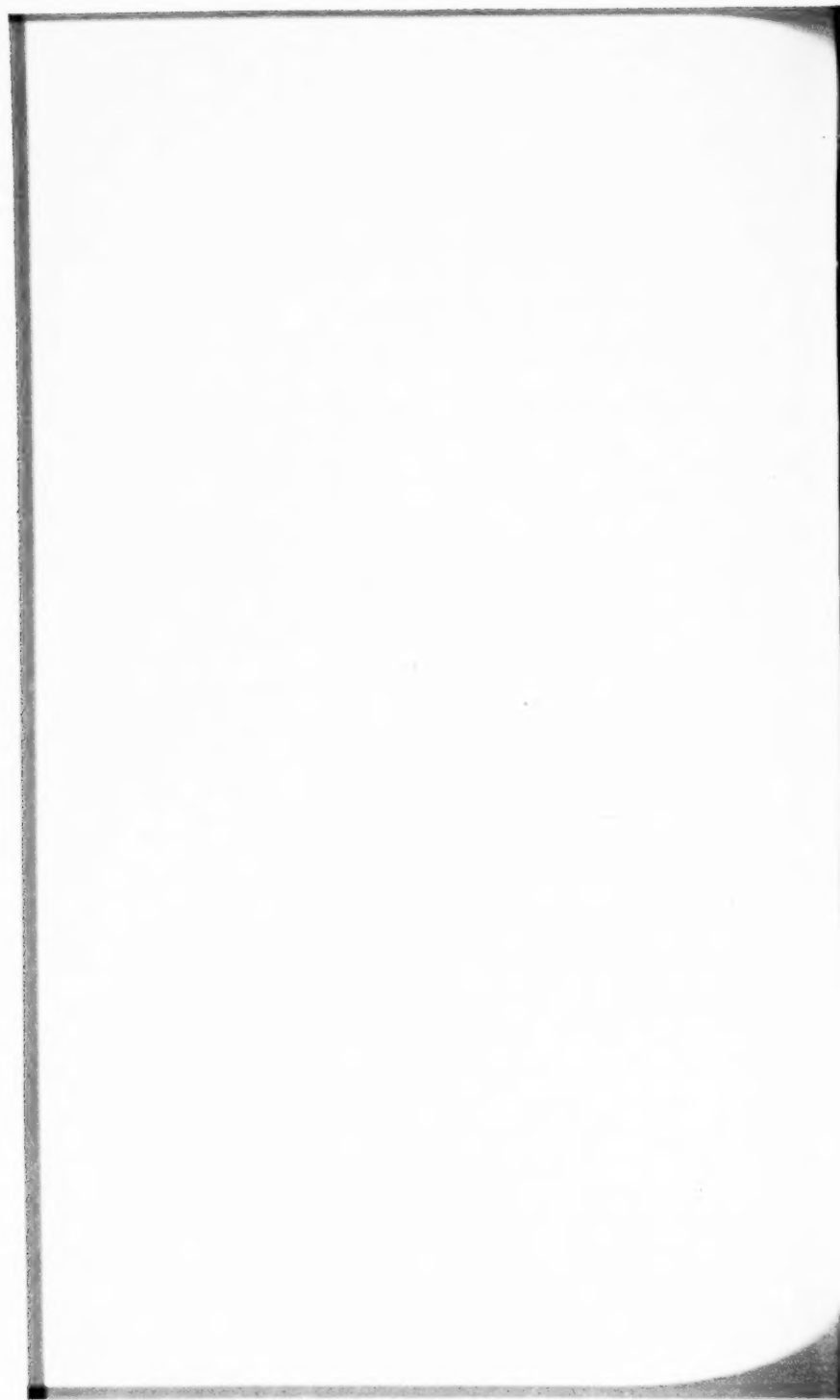
POINT I—The New York Fair Trade Act, as construed below, violates petitioners' rights to due process under the Fourteenth Amendment in that it prohibits sales by description of independently rebottled perfume	11
POINT II—Respondent's price control of independently rebottled perfumes exceeds the sanction of the Miller-Tydings Act and constitutes an extension of trade-mark monopoly against public policy and in violation of the Sherman Anti-Trust Act...	14
POINT III—The questions presented are important..	16
CONCLUSION	17

CASES CITED

	PAGE
<i>Bourjois Sales Corp. v. Dorfman</i> , 273 N. Y. 167.....	13
<i>Canal Co. v. Clark</i> , 13 Wall. 311, 327.....	13
<i>Champion Spark Plug Co. v. Saunders</i> , 331 U. S. 125	13, 14, 17
<i>Coty v. Prestonettes, Inc.</i> , 3 F. (2d) 984.....	12
<i>Doubleday, Doran & Co. v. Macy & Co.</i> , 269 N. Y. 272	13
<i>Dr. Miles Medical Co. v. Park & Sons Co.</i> , 220 U. S. 373 at 404	11
<i>Katzinger Co. v. Chicago Mfg. Co.</i> , 329 U. S. 394.....	15
<i>Krauss v. Jos. R. Peebles' Sons Co.</i> , 58 Fed. 585, Taft, Cir. J., at 591.....	13, 14
<i>Mercoid Corp. v. Honeywell Co.</i> , 320 U. S. 680.....	16
<i>Morton Salt Co. v. Suppiger Co.</i> , 314 U. S. 488.....	16
<i>Old Dearborn Co. v. Seagram Corp.</i> , 299 U. S. 183	12, 13, 15
<i>Pepsodent Co. v. Krauss Co.</i> , 56 F. Supp. 922, at 926..	15
<i>Portchester Wine & Liquor Shop v. Miller Bros.</i> , 281 N. Y. 101, at 105.....	13
<i>Prestonettes, Inc. v. Coty</i> , 264 U. S. 359...2, 11, 12, 13, 14, 15	
<i>Russia Cement Co. v. Frauenhar</i> , 133 Fed. 518, 520...	14
<i>Russia Cement Co. v. Katzenstein</i> , 109 Fed. 314, 317..	14
<i>Seeck & Kade, Inc. v. Tomshinsky</i> , 269 N. Y. 613....	13
<i>Straus v. Victor Talking Machine Co.</i> , 243 U. S. 490 at 500	11
<i>United Drug Co. v. Rectanus Co.</i> , 248 U. S. 90, 97-98..	15
<i>United States v. Bausch & Lomb Co.</i> , 321 U. S. 707....	15
<i>United States v. Univis Lens Co.</i> , 41 F. Supp. 258; aff'd 316 U. S. 241.....	15

STATUTES

New York Fair Trade Act:	PAGE
Section 2	2, 5, 13
Section 369a	4
Section 369b	4, 5
Miller-Tydings Amendment	5, 6
Judicial Code:	
Section 237b	3



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**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF
NEW YORK.**

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

Your petitioners F. W. Woolworth Co. and Nips, Inc.
respectfully represent to this Court:

I

Summary Statement of the Matter Involved

This is an action brought in the New York Supreme Court by Guerlain, Inc., respondent herein, against F. W. Woolworth Co., and Nips, Inc., petitioners herein, invoking the New York Fair Trade Act (Laws of 1935, Chap. 976 as amended), and asking injunctive relief to restrain petitioners from selling independently rebottled perfumes in small ampules under rebottling labels (determined by this

Court in *Prestonettes, Inc. v. Coty*, 264 U. S. 359, not to utilize perfumer's trade mark, name or brands) unless petitioner sells the 10¢ "Nips" for \$1.60, the minimum price for minimum quantity under respondent's fair trade contracts (Complaint. Record pages 17-24).

Neither of petitioners is a party to such contracts.

The trial was by the Court without a jury and on August 9, 1939, a judgment was rendered dismissing the action on the merits (Opinion 171 Misc. 990 R. p. 152-155. Decision with findings. R. pp. 30-39). An appeal from said judgment was taken by respondent to the Appellate Division of the Supreme Court, First Department, which, on March 14, 1947 reversed the judgment of the Supreme Court, Special Term and granted the injunction (Opinion 271 App. Div. 925. Record p. 169. Judgment with findings. R. pp. 164-169). An appeal from said judgment was taken by petitioners to the Court of Appeals, which, on July 2, 1947, affirmed the judgment of the Appellate Division (Opinion 297 N. Y. 11. R. pp. 171-175).

The principal questions involved on said appeal were that the Fair Trade Act does not allow the perfumer to control the sales prices of independently rebottled perfumes sold under rebottler's name with a fair and clear statement; that Section 2 of the Fair Trade Act (the non-signer clause), if thus applied, impairs these petitioners' rights under the Fourteenth Amendment of the Federal Constitution in that it allows, beyond respondent's trade mark monopoly, hostile control of resale prices in petitioners' business and prevents sales by description; and that such price control by the perfumer burdens interstate commerce beyond the allowances of the Miller-Tydings Amendment in violation of the Sherman Anti-Trust Act. These questions were determined in favor of petitioners by the findings of the trial court, but such findings were reversed by the Appellate Division and the questions were adversely determined by the affirmance of the Court of Appeals.

II

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344(b)) in that there is drawn in question the validity of the statute of New York State on the ground of its being repugnant to the Constitution and laws of the United States and in that rights and immunities are specially set up and claimed by your petitioners under the Constitution and statutes of the United States.

The decision of the New York Court of Appeals, the highest court of the State in which a decision could be had, affirming the final judgment granting injunctive relief was rendered on July 2, 1947.

Petitioners' time to file this petition has been extended, by order, to November 3rd, 1947 (R. p. 178).

III

The Questions Presented

(1) Does not the New York Fair Trade Act, as construed below, violate petitioners' rights to due process under the Fourteenth Amendment in that by price control of petitioners' articles it allows respondent to prohibit sales by description of independently rebottled perfume?

(a) May the perfumer (as against non-signers of his trade agreements) control the resale price of the 70 divisions into which his commodity is repackaged where their total sales price is greater than the sales price of his original package?

(b) May the perfumer (as against non-signers of his trade agreements) control the resale prices of the 70 divisions into which his commodity is repackaged where the

smaller packages are sold under labels which do not use his name or brands as trade marks?

(2) Does not respondent's price control of petitioners' independently rebottled perfumes in interstate commerce exceed the sanction of the Miller-Tydings Act?

(a) Does the Miller-Tydings amendment (which contains no non-signer clause) justify a combination in restraint of trade against non-signers of the fair trade agreements?

(b) Does not the "commodity" cease to be the respondent's within the meaning of the Miller-Tydings amendment when it is divided, repackaged into 70 parts and sold at a total price above respondent's minimum price?

(c) Does not respondent's commodity cease to bear "the trade mark, brand or name of the producer or distributor of such commodity" within the meaning of the Miller-Tydings act when the commodity is divided into 70 repackaged ampules and labeled with the name of the rebottler with a true and fair descriptive statement making merely a collateral reference to respondent's trade marks?

(d) Does not respondent's resale price control, as allowed herein beyond his trade mark boundaries, constitute an illegal extension of respondent's trade mark monopoly in violation of public policy?

IV

The Statutes Involved

The New York Fair Trade Act (L. 1935 Chap. 976, as amended, now General Business Law Art. XXIV-A, Section 369-a and Section 369-b are as follows:

"§ 369-a. Price fixing of certain commodities permitted

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of

which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

§ 369-b. Unfair competition defined and made actionable.

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The Miller-Tydings amendment to the Sherman Anti-Trust Act (United States Code Title 15, Chap. 1, § 1), so far as involved herein, is as follows:

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: * * *."

V

Manner in Which Questions Herein Presented are Raised

Petitioners in their answers pleaded violations of the Fourteenth Amendment in the application of the Fair Trade Act to the independent rebottling of the perfume under the judicially approved labels and violations of the Sherman Anti-Trust Act and Clayton Act (R. pp. 16, 20, 22).

The questions were directly involved in the trial of the case and the trial court found that petitioners' rights under the Fourteenth Amendment had been violated (Conclusion 9, R. p. 38) and that respondent's contracts with retailers and its acts thereunder were against public policy, in restraint of trade and void under the Sherman Anti-Trust Act and under the Clayton Act (Conclusion 14, R. p. 39). These findings were reversed by the Appellate Division.

It was conceded on the trial that petitioner Nips was engaged in interstate commerce in the sale of perfumes

manufactured by respondent and rebottled by Nips; that respondent is engaged in interstate commerce in its perfumes and intends to take action in accordance with the Fair Trade laws of the several states and in accordance with the Miller-Tydings Act (R. p. 50). The complaint alleges registration of trade marks in the United States Patent Office (R. p. 5) and the decision below refuses to recognize any distinction between the use of respondent's names *qua* trade mark and in collateral reference (R. p. 174).

The injunction herein constitutes a recognition and an enforcement of respondent's restraint of trade. Petitioner Nips is enjoined and restrained from advertising, offering for sale, selling, distributing or in any manner handling any products which bear the trade marks, brands or names of the plaintiff which are intended to be sold in retail outlets at less than respondent's prices (R. p. 168). The Appellate Division found that the product packaged by petitioner Nips bears the trade marks of respondent (R. p. 165).

V I

Summary Statement of Facts

The first fifteen findings of the trial court have not been reversed.

During the fifteen years before the trial, that is, since 1923, petitioner Woolworth had bought and sold, at retail, independently rebottled perfumes and for a number of years had sold perfumes of the Guerlain variety independently rebottled by the petitioner Nips, Inc. During such period there has been a trade in independently rebottled perfumes and toilet waters sold throughout New York State and throughout the United States involving, so far as petitioner Woolworth is concerned, a million dollars a year (R. p. 31).

The only business of petitioner Nips, Inc. has been the rebottling of perfumes. The rebottling has been by means of a patented process in air-tight, sealed glass ampoules

containing about one-seventieth of a dram of perfume. The sales by petitioner Nips are in New York State and in the different States of the Union in interstate trade and commerce (R. p. 31).

Petitioner Woolworth has been selling independently rebottled perfumes such as Guerlain's in packages bearing the following inscription:

“NIPS
Perfumes
Genuine French Extracts
Guerlain's
Shalimar
Rebottled by Nips, Inc., N. Y.
Wholly Independent of
Guerlain.”

The word “Nips” in the label is printed in larger letters than any of the other words, and the words “Rebottled by Nips, Inc., N. Y. Wholly Independent of Guerlain” are plainly printed in letters all of the same size (R. p. 32).

Petitioner Woolworth has been selling the perfume in small containers at a price of 10¢. Petitioner Nips purchases the perfume in the open market and rebottles and repacks it under such label (R. p. 33).

The total resale price to the public is \$7.00 for a sufficient number of ampoules to equal a dram, as against the price of \$1.60 maintained by the respondent for “one dram or less.” (R. p. 33).

Respondent Guerlain sells the perfume under trade marks, names and brands filed in the U. S. Patent Office (R. p. 5) in containers of not less than three-quarters of an ounce, so corked or stopped that the desired amount of perfume for each particular use may from time to time be withdrawn, the bottle re-corked and re-stopped, and used again. Such bottle in ordinary use may last a year (R. p. 33).

The petitioners' ampoule is so formed that it may be readily carried in a lady's handbag and used as desired as distinguished from bottles of respondent which cannot be so conveniently carried or used. (The ampoule can be

used but once and then only by breaking the two ends of the ampoule).

VII

Reasons Relied Upon for the Allowance of the Writ

The right of a merchant to sell by fair description has been denied and respondent's trade mark monopoly by price control has been extended beyond previously recognized boundaries. This new doctrine is not limited to perfume but would have equal application to sales of other divided and repackaged commodities, and of second hand, repaired or reconditioned articles. The articles involved are in interstate commerce and the construction a federal statute, designed to take a restricted class of contracts from the condemnation of the Sherman Anti-Trust Act, is involved.

The questions are federal, of substance and have not heretofore been determined by this Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued, directed to the New York Court of Appeals in respect of its judgment herein, to be reviewed by this Court and for such other relief as to this Court may seem proper.

Dated: October 29, 1947.

F. W. WOOLWORTH Co.

By MARTIN A. SCHENCK

and

KENNETH W. GREENAWALT

Counsel for Petitioner

NIPS, INC.

By MARTIN A. SCHENCK

and

KENNETH W. GREENAWALT

Counsel for Petitioner

CERTIFICATE OF COUNSEL

We hereby certify that we have examined the foregoing petition for a writ of certiorari and that in our opinion it is well founded and the cause is one in which the petition should be granted.

Dated: New York, N. Y., October 29, 1947.

MARTIN A. SCHENCK
KENNETH W. GREENAWALT
*Attorneys for Petitioners,
F. W. Woolworth Co. and
Nips, Inc.*

IN THE
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**PETITIONERS' BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

This petition seeks review on certiorari to the New York Court of Appeals of a judgment which has so applied the New York State Fair Trade Act as to allow respondent perfumer to control the sales price of petitioners' independently rebottled perfumes carrying labels approved by this Court in *Prestonettes, Inc. v. Coty*, 264 U. S. 359.

POINT I

The New York Fair Trade Act, as construed below, violates petitioners' rights to due process under the Fourteenth Amendment in that it prohibits sales by description of independently rebottled perfume.

The right of the merchant to buy and then resell without the original seller controlling the second sales price is a fundamental right protected by the Fourteenth Amendment (*Straus v. Victor Talking Machine Co.*, 243 U. S. 490 at 500; *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 at 404).

An exception to the general rule has been recognized under the Fair Trade Act where, in the resale, the trade-mark, name or brand of the original seller is involved and his good will is affected. In *Old Dearborn Co. v. Seagram Corp.*, 299 U. S. 183, this Court recognized the sale of trade-marked articles in the original containers as taken out of the general rule because of the good will of the owner of the trade-mark involved in the resale. This Court, throughout its opinion, emphasized that the control of the resale price was for the purpose of preventing a forbidden use of trade-mark, trade name or brand and to protect the good will of the trade-mark owner against injury. The Illinois statute (of identical terms with the New York statute herein) was held constitutional in its recognition of the essential difference between trade-marked goods and other goods not so identified.

But this Court in *Prestonettes, Inc. v. Coty*, 264 U. S. 359, per Holmes J., held that division and sale of perfumery in small containers under a label which merely made a collateral reference to the owner's trade-mark did not constitute a violation of the owner's trade-mark rights and that the perfumer's good will was not involved. This Court recognized the right to sell under a true statement of facts and stated that division of the larger quantity of perfume into smaller quantities under the approved label, constituted the article offered "as new and changed" (p. 369). This Court approved a label as taking the case out of the plaintiff's right of control and as constituting sufficient protection to the perfumer's good will. On further proceedings in the Circuit Court of Appeals of the Second Circuit (*Coty v. Prestonettes, Inc.*, 3 F. (2d) 984), the label was shortened and clarified and was held to protect the perfumer in respect not only of trade-mark infringement but of unfair competition.

The petitioners herein have been using this label.

The ampoule, because of its smallness, peculiar shape and limited use, constitutes an independent and additional element of change and newness.

This Court has recently in *Champion Spark Plug Co. v. Saunders*, 331 U. S. 125, applied the rule in *Prestonettes, Inc. v. Coty*, *supra*, to reconditioned Champion spark plugs sold under the name "Champion" with an additional statement that they were reconditioned and repaired.

The Court of Appeals herein has held (R. p. 174) "That statute does not draw any distinction between a use of plaintiff's mark *qua* trade-mark and a collateral reference to the mark in describing the product being sold, and we cannot, consonant with the manifest legislative purpose, construe the act as embodying any such distinction."

The petitioners desire to argue that the application of the Fair Trade Act to the business of independently rebottled perfumes sold under a fair and clear statement of fact constitutes an extension of the rule in *Old Dearborn Co. v. Seagram Corp.*, *supra*, in violation of the merchant's right recognized in *Prestonettes, Inc. v. Coty* and in impairment of the merchant's constitutional right to control his sales price.

The New York Court of Appeals at first held the Fair Trade Act unconstitutional (*Doubleday, Doran & Co. v. Macy & Co.*, 269 N. Y. 272; *Seeck & Kade, Inc. v. Tomshinsky*, 269 N. Y. 613). In deference to *Old Dearborn Co. v. Seagram Corp.*, *supra*, such Court held the Act constitutional in *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167. As it said in *Portchester Wine & Liquor Shop v. Miller Bros.*, 281 N. Y. 101, at 105, it surrendered its view that Section 2 of the Act (the non-signer clause, now General Business Law, § 369-b, involved herein), was essentially obnoxious to the due process clauses.

It is appropriate, therefore, for this Court to coordinate its decision in *Old Dearborn Co. v. Seagram Corp.*, *supra*, with its decision in *Prestonettes, Inc. v. Coty*, *supra*.

Petitioners submit that the constitutional questions presented are important. The right of merchants to sell their wares under a true statement of facts is fundamental and has been long recognized. (*Canal Co. v. Clark*, 13 Wall. 311, 327; *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. 585;

Taft, Cir. J. at 591; *Russia Cement Co. v. Katzenstein*, 109 Fed. 314, 317; *Russia Cement Co. v. Frauenhar*, 133 Fed. 518, 520; *Prestonettes, Inc. v. Coty* (*supra*).

If the Fair Trade Act allows the perfumer to control the price of independently rebottled perfumes sold under the rebottler's name, it not only destroys a long established industry in rebottled perfumes but can be used to destroy the sale of a wide variety of second hand articles. This Court has recently pointed out in *Champion Spark Plug v. Saunders, supra*, that if the sale of reconditioned spark plugs under the name of "Champion" could be enjoined, regardless of any true and clearly stated label or designation, that the sale of second hand Ford and Chrysler cars could likewise be enjoined. If the perfumer may by price control prevent division and independent rebottling, regardless of the clarity of the truth telling label, then the original manufacturer of not only spark plugs, but of automobiles, may control the price of such second hand articles.

POINT II

Respondent's price control of independently rebottled perfumes exceeds the sanction of the Miller-Tydings Act and constitutes an extension of trade-mark monopoly against public policy and in violation of the Sherman Anti-Trust Act.

The Miller-Tydings amendment has no non-signer clause. Its construction in respect to non-signers is involved herein.

Each petitioner pleaded, and the trial court found, violation of the Sherman Anti-Trust Act.

Guerlain in its complaint pleaded the filing in the Patent Office of trade-marks in Guerlain as well as in the brand name Shalimar.

It was conceded on the trial that the petitioner Nips is involved in interstate commerce in the articles in ques-

tion. Petitioner Woolworth's right to receive the articles for sale within the various states is sufficiently affected by any interference with interstate commerce as to enable it also to raise the point.

When Congress passed the Miller-Tydings Act, this Court had rendered its decision in *Old Dearborn Co. v. Seagram Corp.*, *supra*, which decision was referred to in the debates in Congress (see in this connection *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922, at 926).

The extension of the perfumer's price control to the rebottled article which this Court in *Prestonettes, Inc. v. Coty* has held to be new and changed by virtue of division, rebottling and labelling is. petitioners desire to argue, an extension of the perfumer's trade-mark monopoly in violation of the Sherman Anti-Trust Act (*United States v. Univis Lens Co.*, 41 F. Supp. 258; *aff'd* 316 U. S. 241; *United States v. Bausch & Lomb Co.*, 321 U. S. 707).

Against the very nature of trade-mark (*United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 97-98) respondent has been allowed to make "a negative and merely prohibitive use of it as a monopoly". The words Guerlain and Shalimar have become taboo (*Prestonettes, Inc. v. Coty, supra*).

The construction of the Miller-Tydings Act in respect of the extent of trade-mark rights in interstate commerce is peculiarly a federal question for this Court to determine. The statement of the Court of Appeals toward the end of its opinion (R. p. 174)—"The fact remains that the commodity" (i.e., the petitioners' commodity involved) "bears the trade-mark and name of the producer of the perfume—the sole condition necessary to render the statute applicable" is directly contradictory to the holding of this Court in both *Prestonettes, Inc. v. Coty, supra*, and *Champion Spark Plug Co. v. Saunders, supra*.

The boundaries of monopoly have here been illegally extended by respondent's price fixing agreement to the restraint of trade in the article.

Katzinger Co. v. Chicago Mfg. Co., 329 U. S. 394.

POINT III

The questions presented are important.

Important public policy is involved in the extension of monopoly beyond statutory allowances.

Morton Salt Co. v. Suppiger Co., 314 U. S. 488;
Mercoid Corp. v. Honeywell Co., 320 U. S. 680.

The respondent's method of price control as applied to non-signers has resulted in the destruction of the rebottling industry not only in New York State but in interstate commerce.

The Report of the Federal Trade Commission on Resale Price Maintenance, submitted to the Congress December 13, 1945 at pages LX, LXI states:

“As the result of its investigations in antitrust cases, the United States Department of Justice has stated that, as an amendment to the antitrust laws, the Tydings-Miller Act does not serve the purposes which were urged upon Congress as a reason for its passage in that it sanctions arrangements inconsistent with the purpose of the antitrust laws, and becomes a cloak for many conspiracies in restraint of trade which go far beyond the limits established in the amendment. The conclusion of the Department of Justice is that the actual effects of resale price maintenance have been those which are to be expected from private price fixing conspiracies unregulated by public authority, whether or not they enjoy the sanction of law. The department has further stated it to be its belief that if its Antitrust Division had sufficient men and money to examine every resale price maintenance contract written under State and Federal legislation, and to proceed in every case in which the arrangement goes beyond the authorizations of the Tydings-Miller amendment, there would be practically no resale price maintenance contracts, and that, in the absence of such wholesale law enforcement, the system of resale price legislation fosters

restraints of trade such as Congress never intended to sanction.

The Federal Trade Commission, which shares with the Department of Justice the function of enforcing the antitrust laws, likewise finds both its personnel and funds insufficient to adequately investigate and proceed in all matters involving possible use of resale price maintenance contracts in violation of law."

CONCLUSION

The petition for the Writ Should be Granted.

Respectfully submitted,

MARTIN A. SCHENCK

KENNETH W. GREENAWALT

Attorneys for Petitioners